



The limited effect of costs sanctions on litigants in person

Judges' powers to impose costs sanctions on litigants in person abusing the court process may have little effect in practice, say **Francesca Kaye** and **Mary Hodgson**

The changes brought about by LASPO and the Jackson reforms have fuelled fears of a rise in the number of unrepresented parties conducting litigation. Just days before the new rules came into force, Sir Alan Ward in *Wright v Wright* [2013] EWCA Civ 234 commented on the difficulties encountered by the judiciary not only in trying to bring order to the chaos created by litigants in person, but also on the increases to the length of hearings and costs as a result of attempts to ensure that litigants in person are not disadvantaged by their unrepresented status.

Judges have powers to impose costs sanctions on lay persons who abuse the court process, as illustrated in *Bank of Scotland v Azam Qutb* [2012] EWCA Civ 1661, but this may have limited effect.

Litigation friend

The *Qutb* case started in March 2002 as a possession action brought by the bank in relation to a property which had been sold by Mrs Qutb to the bank's customer, Mr Hussain, who charged it to the bank. The transfer to Mr Hussain was challenged by Mrs Qutb and eventually set aside. Mr Hussain was convicted of fraud and jailed.

The property was transferred back to Mrs Qutb, subject to the bank's charge. Throughout the proceedings Mrs Qutb, who was suffering from Alzheimer's, was assisted by her son, Mr Azam Qutb, acting as her litigation friend.

The bank then revived the possession action, adding Mrs Qutb as second defendant, and the court had to consider whether Mrs Qutb was bound by the bank's charge.

The trial took place in September 2010. Mr Qutb gave evidence that (inter-alia) his mother lived in America where she was undergoing medical treatment.

The bank's claim was successful and a possession order was made including a

declaration that Mrs Qutb was bound by the bank's charge.

Court misled

On 3 December 2010 an appeal was issued by Mr Qutb on behalf of his mother. A hearing was listed for November 2011.

Shortly before the hearing, the bank discovered that Mrs Qutb had in fact died in January 2010, almost one year before the appeal was lodged in her name and nine months before the original trial. Mr Qutb had not informed the bank or the court of his mother's death. On the contrary he had made positive representations that she was alive and that he continued to act as her litigation friend.

The bank successfully applied to strike out the notice of appeal as an abuse of process, alternatively to set aside the permission to appeal. The court determined that Mr Qutb ceased to be his mother's litigation friend when she died and, as he had not applied to represent his mother's estate, he had no legal standing to conduct the litigation.

By continuing the litigation and asserting that his mother was alive Mr Qutb intentionally misled the court and his actions constituted an abuse of process. The court set aside the permission to appeal and the appeal was dismissed.

Acting without authority

By 2012 the bank had taken possession of the property and sold it but there had been insufficient equity in the property to repay the debt and the costs of the litigation. The bank therefore applied under section 51 of the Senior Courts Act 1981 and (old) CPR Rule 48.2 for an order that Mr Qutb be personally liable for the bank's costs on an indemnity basis.

The bank's application was based on Mr Qutb's implication that he had his mother's authority to act in the litigation. The bank argued the circumstances were similar to

those where a solicitor has acted without authority and it asked the court to find Mr Qutb personally liable for the costs of proceedings which he pursued after his mother's death, without authority.

When a solicitor acts on behalf of a client in litigation there is an implied warranty that he has a client who had instructed him to assert or deny claims made in those proceedings. A breach of that warranty of authority is a strict liability issue.

Own benefit

The court accepted the bank's argument, finding that Mr Qutb acted for his own benefit, as beneficiary of his mother's estate; deceived the bank into incurring costs; and made false representations in evidence and submissions. He was ordered to pay (on an indemnity basis) the bank's costs of the appeal, the strike-out application and the application for costs.

The facts of this case are unusual and it is unlikely that there will be many high value cases run by unqualified litigation friends. However, this is likely to be increasingly common in the county courts.

The ability to treat a lay person like a solicitor acting in breach of his warranty of authority by holding him personally liable for costs may be a useful tool to sanction individuals who waste the court's and their opponents' time by running litigation without the knowledge of the named claimant or defendant.

However, on the assumption that the inability to pay for legal representation is part of the cause of this problem, the deterrent effect of costs sanctions is likely to have limited benefit as the litigant or their friend may have no assets against which to enforce.

Francesca Kaye (pictured) is a partner and Mary Hodgson a solicitor at Russell-Cooke LLP (www.russell-cooke.co.uk)